90-1374

Supreme Court, U.S.
FILED
MAR 4 1991
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1990

DONALD J. TRESHMAN, JR.,

Petitioner,

vs.

THE STATE OF TEXAS,

Respondent.

Petition For A Writ Of Certiorari To The Court Of Appeals For The Eleventh Judicial District Of Texas

PETITION FOR A WRIT OF CERTIORARI

RICHARD W. SCHMUDE
P.O. Box 674
Tomball, Texas 77377-0674
(713) 376-0277
Attorney of Record for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the peaceful presence and conduct of Petitioner, a resident and taxpayer of the Katy Independent School District in Texas ("Katy ISD"), in distributing literature, free of charge, on A.I.D.S., venereal herpes and abortion to high school students in or near a school bus unloading area at a public high school of the Katy ISD and in engaging or attempting to engage in speech incident thereto prior to the time that classes were to begin for the day, were protected under the free press and speech provisions of the 1st Amendment to the U.S. Constitution, as enjoined on the states under the Due Process Clause of the 14th Amendment to the U.S. Constitution;

2. Whether the public school property used by Petitioner and the time of use constituted a limited public forum for the peaceful exercise of 1st Amendment rights of free speech and press;

3. Whether *Tex. Penal Code*, § 30.05, proscribing criminal trespass, was unconstitutional under the free speech and press provisions of the 1st Amendment as applied to the facts of this case;

QUESTIONS PRESENTED – continued

4. Whether Petitioner's presence and conduct at issue were proper under the open character nature of the property involved under *Tex. Education Code*, § 2.03, which declares that the educational institutions covered by the code "are designed for and are open to the people" of Texas "subject only to such rules and regulations as the governing boards of such institutions may be authorized in this code to make and enforce for the welfare of the various institutions under their control", and whether Katy ISD Policy No. 101914, ADVERTISING IN THE SCHOOLS, was void as violative of the free speech and press provisions of the 1st Amendment to the U.S. Constitution and the Due Process and Equal Protection Clauses of the 14th Amendment to the U.S. Constitution; and

5. Whether the Court of Appeals deprived Petitioner of liberty and property without due process of law when it refused to reach Petitioner's arguments included in No. 4, above, because of its ruling that *Tex. Education Code*, § 2.03, did not apply to the case.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	4
A. The Pretrial Hearing	4
1. Defendant's Motion To Quash Information No. 1	4
2. Defendant's Motion To Quash Information No. 2	5
3. Defendant's Motion To Quash Information No. 6	6
4. Evidentiary Matters from Pretrial Hearing	6
a. The School and Its Setting	6
b. Katy ISD Advertising Policy	7
c. Literature Approval/Disapproval Actions	8
d. Activities on January 21, 1988, at the School	9
5. Rulings	11
B. The Trial	11
C. Federal Questions	12
ARGUMENT	15
I. PETITIONER'S PRESS AND SPEECH ACTIVITIES ON SCHOOL PROPERTY WERE AUTHORIZED CONSTITUTIONALLY OR LEGALLY	15

TABLE OF CONTENTS – Continued

Page

A. The School Property 15

1. Limited Public Forum 15

2. Open Character Status 16

B. Legality of Petitioner's Presence and Conduct 17

C. The Court of Appeals and Tex. Education Code, § 2.03 20

II. THE TEXAS CRIMINAL TRESPASS LAW WAS UNCONSTITUTIONAL AS APPLIED TO THE FACTS OF THIS CASE 21

CONCLUSION 21

TABLE OF AUTHORITIES

Page

I. CASES:

Dallas Association of Community Organizations for Reform Now v. Dallas County Hospital Dist., 670 F. 2d 629 (C.A. 5, 1982), *reh. denied En Banc*, 680 F. 2d 1691 (1982), *cert. denied*, 459 U.S. 1052 (1982) 15, 16, 17

Evits v. Lucey, 469 U.S. 387 (1985) 21

Grayned v. City of Rockford, 408 U.S. 104 (1972) 20

Le Croy v. Hanlon, 713 S.W. 2d 335 (S.C. Tex., 1986) 20

Lovell v. City of Griffin, Ga., 303 U.S. 444 (1938) 19

Marsh v. Alabama, 326 U.S. 501 (1946) 21

Martin v. Struthers, 319 U.S. 141 (1943) 18

New York Times v. Sullivan, 376 U.S. 254 (1964) 18

Police Dept. of the City of Chicago v. Mosley, 408 U.S. 92 (1972) 20

Reed v. State, 762 S.W. 2d 640 (Tex. App. – Texarkana, 1988, pet. ref.), *cert. denied*, 110 Sup. Ct. 81 (1989) 15

Tinker v. Des Moines I.C.S. Dist., 393 U.S. 503 (1969) . 17-18

Tucker v. Texas, 326 U.S. 517 (1946) 21

II. U.S. CONSTITUTION:

1st Amendment ..... *passim*

14th Amendment: ..... *passim*

Due Process Clause ..... *passim*

Equal Protection Clause 6, 13, 19, 20

TABLE OF AUTHORITIES – Continued

Page

III. U.S. STATUTORY LAW:

28 U.S.C. 1257(a) 1

IV. TEXAS STATUTORY LAW:

Tex. Education Code, § 2.03 ..... *passim*

Tex. Penal Code, § 30.05 ..... 5, 13, 21

V. OTHER:

Katy Independent School District Policy No. 101914, ADVERTISING IN THE SCHOOLS, GI (LOCAL), Issued Date July 9, 1984, Update 23 ..... *passim*

Rule 230(f), Tex. R. App. Proc. 4

OPINION BELOW

The Opinion of the Court of Appeals (Pet. App. 1-21) is not reported.

JURISDICTION

The Judgment of the Court of Appeals was rendered on July 12, 1990 (Pet. App. 21). The Court of Appeals overruled Petitioner's timely-filed Motion for Rehearing on August 30, 1990 (Pet. App. 22-23). On December 5, 1990, the Court of Criminal Appeals refused Petitioner's timely-filed Petition for Discretionary Review (Pet. App. 24). Petitioner's timely-submitted Motion for Rehearing was marked "filed" in the Court of Criminal Appeals on December 19, 1990. By letter to Petitioner's Attorney dated February 7, 1991, a deputy clerk of that Court said that such motion "was inadvertently marked 'filed' ", and that it "should have been 'rejected' for noncompliance with rule 230(b) T.R.A.P." (Pet. App. 25). The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

U.S. CONSTITUTION:

First Amendment:

> Congress shall make no law • • • abridging the freedom of speech, or of the press • • • .

Fourteenth Amendment:

> • • • [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

TEXAS STATUTORY LAW:

The *Texas Education Code* provides, in pertinent part:

§ 2.03 *Dedication to the People of Texas.*

> The educational institutions covered by this code are designed for and are open to the people of the State of Texas, subject only to such rules and regulations as the governing boards of such institutions may be authorized in this code to make and enforce for the welfare of the various institutions under their control.

KATY INDEPENDENT SCHOOL DISTRICT POLICY:

Katy ISD Policy 101914, ADVERTISING IN THE SCHOOLS, GI (LOCAL), Issued Date July 9, 1984, Update 23, provides as follows:

POLITICAL/ SECTARIAN GROUPS	School facilities shall not be used to advertise, promote, sell tickets, or collect funds for any organization or program defined as political or sectarian in nature, without prior approval of the Superintendent or designee.
COMMERCIAL ADVERTISING	Commercial advertising shall be prohibited in District schools unless approved by the Superintendent, with the exception of officially approved book covers, school calenders, and/or advertising in school publications. (See FMA)

Announcements of a commercial nature shall be made in school only with prior approval of the principal. Approved announcements shall be made by the principal or designee.

CIVIL/CULTURAL GROUPS

The principal may authorize non-profit civic or cultural organizations to advertise shows, events, or activities, distribute free tickets or ticket discounts or options, or make commercial announcements in the schools. Advertising, if approved, shall be limited to a size suitable for a school bulletin board. Schools shall not sell tickets, collect funds, or distribute advertising literature by or through students without prior approval of the Superintendent or designee.

CRITERIA FOR APPROVAL

In granting approval under this policy, the principal or Superintendent shall reject any proposals or materials that are reasonably foreseeable to be disruptive, libelous, obscene, inflammatory, sexually inappropriate for the age of the audience, or that endorse actions endangering the health or safety of students. The Superintendent shall grant or reject the request within five school days, and decisions may be appealed to the Board.

ENDORSEMENTS

Solicitations or use of the schools to promote the merit of products by brand name or trademark is prohibited by the Board.

STATEMENT OF THE CASE

Following a jury trial in County Criminal Court at Law No. 8 of Harris County, Texas ("Trial Court"), Petitioner was found guilty of criminal trespass occurring on January 21, 1988, of the property of one James Carthel. The property involved was that of the Mayde Creek High School which is a public high school located in Harris County, Texas ("School"). Petitioner was sentenced to 180 days confinement and to pay a fine of $1,000.00, neither of which was probated. The sentence was in accord with assessments by the Jury after a punishment phase proceeding.[1] The Jury did not recommend probation.

On Appeal, the Court of Appeals affirmed the Judgment of Conviction and overruled subsequently Petitioner's Motion for Rehearing (Pet. App. 21, 22-23). The Court of Criminal Appeals refused Petitioner's Petition for Discretionary Review (Pet. App. 24).[2]

The pertinent facts are these:

A. *The Pretrial Hearing*. Before trial, several motions to quash the Information were filed on behalf of Petitioner, including motions to quash nos. 1, 2 and 6. An evidentiary hearing was granted for the latter motions.

1. *Defendant's Motion To Quash Information No. 1.* This motion alleged, *inter alia*, that Petitioner's presence and conduct (which it alleged therein) were justified and

---

[1] The sentence has not been executed.

[2] Petitioner's Motion for Rehearing in that Court was rejected for failure to comply with Rule 230(f), Tex. R. App. Proc.

protected under the 1st Amendment to the U.S. Constitution, as enjoined upon the States under the Due Process Clause of the 14th Amendment thereof; that the outside school premises which he used for such purposes constituted, at the time so used, either a public forum or a limited public forum for speech and press purposes; that, in the alternative, "[s]ince public high school students have the right to receive information under the 1st Amendment, it is a corollary that another, such as the Defendant, has the right to offer same so long as the offering and the receipt do not substantially and materially interfere with school discipline (or school activities) and do not infringe on the rights of others"; and that Petitioner's literature distribution activities did not interfere substantially and materially with school discipline or activities and did not infringe upon the rights of others (Tr. 12-16).[3]

2. *Defendant's Motion To Quash Information No. 2.* This motion alleged that *Tex. Penal Code*, § 30.05, proscribing criminal trespass, was unconstitutional under the U.S. and Texas Constitutions as applied to the facts of this case. It alleged, *inter alia*, that such application "(1) violates the free speech and press provisions of the 1st Amendment to the U.S. Constitution, as enjoined upon the States under the Due Process Clause of the 14th Amendment to the U.S. Constitution, [and] (2) deprives Defendant of liberty and property without due process of

---

[3] "Tr." refers to the Clerk's Transcript of documentary materials. "S.F." refers to the Court Reporter's Statement of Facts or transcription of the proceedings in the Trial Court.

law, in violation of the Due Process Clause of the 14th Amendment to the U.S. Constitution * * * " (Tr. 17-18).

3. *Defendant's Motion to Quash Information No. 6.* This motion sought to quash the Information on various grounds, including that the particular school property used by Petitioner and others for free speech and press activities was open to them for such activities per *Tex. Education Code*, § 2.03, since there was no lawful rule or regulation of the Board of Trustees of the Katy ISD which operated to close such property for such activities (Tr. 58-59, 60, 63). It alleged that the activities at issue were not restricted by any rule or regulation adopted by the Board of Trustees of the Katy ISD; that if the Katy ISD Policy concerning advertising was applicable, such Policy was unconstitutional as violative of the Due Process and Equal Protection Clauses of the 14th Amendment to the U.S. Constitution and of certain sections of the Texas Constitution; and that the advertising policy was unconstitutional in such regard for various reasons, including that the criteria for approval failed to set forth objective standards for application, that such criteria were essentially subjective and that the policy had been applied unconstitutionally (Tr. 59-60, 64-88).

4. *Evidentiary Matters from Pretrial Hearing.* a. *The School and Its Setting.* The School is owned or operated by the Katy Independent School District ("Katy ISD"), which is a governmental subdivision of the State of Texas organized for school purposes[3] (IV S.F. 174). The School is located in Harris County, Texas, and is about 300 to 500 feet back from Groschke Road, which is a public road (I S.F. 37).

Students and others arrive at the School by private motor vehicle or school bus and did so on January 21, 1988. Literature could not have been distributed from the public road without creating a traffic hazard (I S.F. 37-38). There were no signs or barriers restricting entry to outside School property on January 21, 1988, nor were there signs restricting speech or conversation on such property (I S.F. 43, 77-78). Students conversed prior to and after receiving literature that day (I S.F. 43).

b. *Katy ISD Advertising Policy*. Katy ISD Policy No. 101914, ADVERTISING IN THE SCHOOLS, GI (LOCAL), Issued Date July 9, 1984, Update 23 ("Advertising Policy"), provides as follows:

POLITICAL/ SECTARIAN GROUPS	School facilities shall not be used to advertise, promote, sell tickets, or collect funds for any organization or program defined as political or sectarian in nature, without prior approval of the Superintendent or designee.
COMMERCIAL ADVERTISING	Commercial advertising shall be prohibited in District schools unless approved by the Superintendent, with the exception of officially approved book covers, school calendars, and/or advertising in school publications. (See FMA) Announcements of a commercial nature shall be made in school only with prior approval of the principal. Approved announcements shall be made by the principal or designee.
CIVIC/CULTURAL GROUPS	The principal may authorize non-profit civic or cultural organizations

	to advertise shows, events, or activities, distribute free tickets or ticket discounts or options, or make commercial announcements in the schools. Advertising, if approved, shall be limited to a size suitable for a school bulletin board. Schools shall not sell tickets, collect funds, or distribute advertising literature by or through students without prior approval of the Superintendent or designee.
CRITERIA FOR APPROVAL	In granting approval under this policy, the principal or Superintendent shall reject any proposals or materials that are reasonably foreseeable to be disruptive, libelous, obscene, inflammatory, sexually inappropriate for the age of the audience, or that endorse actions endangering the health or safety of students. The Superintendent shall grant or reject the request within five school days, and decisions may be appealed to the Board.
ENDORSEMENTS	Solicitations or use of the schools to promote the merit of products by brand name or trademark is prohibited by the Board.

Dr. Linda Woodward, the Superintendent of the Katy ISD, testified as to the criteria in the policy for approval of literature thereunder. She said or admitted that the determinations were left to the discretion of the reviewer, and that reasonable minds could differ on application of such criteria (I S.F. 116-119, 130-131).

c. *Literature Approval/Disapproval Actions*. Defendant's Exhibits 7-17 are copies of a number of items of

literature which were approved for posting or distribution at the School, together with related memoranda of approval, etc. These materials were "screened by the central office and went to the campus level with permission for them to be distributed [or posted] if the local campus administration [saw] fit" (I S.F. 78). They covered sports and other subjects, including a political one, between November 1984 and April 1988.

In January 1986, Mr. T. Vincent Smith and a companion went to the School in order to distribute literature there (I S.F. 60, 103-104). He was advised by Gary Williams, an employee of Katy ISD, of the policy for approval of literature. Smith gave some basically pro-life literature to Williams for approval thereunder and he and his companion left the area (I S.F. 59-60, 104). Approval was denied by Dr. Woodward (I S.F. 104). According to Williams, "[i]t was felt, I believe, that it would be inappropriate for the students and under the circumstances, under which it would be distributed, I believe, it was judged to be inappropriate at that time" (I S.F. 104; see I S.F. 111). Williams supposed, however, that reasonable minds could differ on what was inappropriate (I S.F. 112). The disapproval action was communicated to Smith by Williams by telephone later that day and by letter afterwards. Smith did not apply for permission to distribute literature in 1987 or on January 21, 1988 (I S.F. 61, 63).

d. *Activities on January 21, 1988, at the School.* On Thursday, January 21, 1988, which was a school day, Petitioner, Smith and another person went to the School in order to distribute pro-life/pro-family literature (I S.F. 35-36, 57-58). They arrived around 7 a.m. and started distributing literature around 7:15 a.m. before classes

were to begin that day (I S.F. 38). Petitioner was located on a sidewalk adjacent and attached to the school building and in the vicinity of a bus unloading area (I S.F. 38, 55, 64-65). The others were in the general area. Petitioner was "a little further away" than 4 to 5 feet of the school doors (I S.F. 55).

The literature dealt with A.I.D.S., herpes and abortion, and Smith also had a letter which he had written (D. Exs. 1-4). Literature was offered and received. Some students refused it. School officials attempted "to discourage the children from taking the literature or to infer that . . . [they] should just place the literature in the trash can at one point" (I S.F. 45).

Neither the Petitioner nor the others, to Petitioner's knowledge, prevented any student from going to class, enticed any student away from class, entered any class or building, fought or argued with any student, blocked passage of any student, blocked any entrance or exit of a building, threatened anyone, used a bullhorn or sound amplification or created litter in the sense of throwing it down (I S.F. 40-42, 72-74, 76). They were peaceful and orderly, and reasonable under the circumstances (I S.F. 42-43; see I S.F. 77, 110).

In the opinion of Dr. James Carthel, the Principal of the School, the group was "unruly" because they did not obey his directive (I S.F. 77). In addition, Carthel testified that Petitioner was blocking the flow of traffic from the bus to the School by standing in the middle of a five foot sidewalk (I S.F. 68-69). The flow of traffic went around Petitioner and, in the process, some would take literature and some would not (I S.F. 69-70). According to Williams,

Petitioner was impeding the flow of students off the bus by standing in the doorway of the bus (I S.F. 108-109). Petitioner's hands were full of literature and "he was standing where he could offer the literature to them, of course" (I S.F. 109). No student complained to Williams that he was being blocked (I S.F. 109).[4]

5. *Rulings.* At the conclusion of the hearing, the Trial Court denied Motions To Quash Informations Nos. 1, 2 and 6 (I S.F. 146). Defense Counsel objected and excepted thereto.

B. *The Trial.* At the trial, the evidence included a good deal of the testimony developed at the pretrial hearing. In addition, the evidence showed that Petitioner was asked by School personnel whether he had permission to distribute the literature (under the Advertising Policy, above) (III S.F. 27-28, 36, 86-87, 134, 137, 220). Petitioner had not seen the policy and did not attempt to comply with it (IV S.F. 225). Carthel asked Petitioner to step aside and talk to him concerning going through channels (for approval of the literature) (IV S.F. 121, 141-142, 143, 171, 220). Petitioner did not do so. He and the others remained until about 5 or 10 minutes to 8:00 a.m. The students were inside the School by 7:40 a.m. (IV S.F. 90).

Carthel asked whether they would like to come into the cafeteria to clean up the litter that the students dropped on the floor there (IV S.F. 193, 202, 221-222; see

---

[4] At the trial, Williams testified on cross-examination that the Petitioner was standing on the curb, about 2 or 3 feet from the front door (of the bus) (IV S.F. 113). To the question, "All right. So he was not in the bus?", Williams answered, "No. He was at the front door of the bus" (*Ibid.*).

IV S.F. 118). Petitioner and Smith agreed (IV S.F. 193), 221-222). Williams said that that would not be necessary, and Carthel concurred (IV S.F. 118-119, 151-152, 194). Carthel said that the invitation was an error on his part, and that it was retracted or withdrawn quickly (IV S.F. 145, 152, 173).

When the group was about to leave, a Katy ISD security officer drove up, and Carthel either said that this man might like to talk to you or indicated that they should stay and talk to him (IV S.F. 148-149, 196, 221). Petitioner and the others conversed with the security officer. Carthel said that they had his "tacit approval" to stay and talk with him, and that this occurred with his consent (IV S.F. 146, 149).

C. *Federal Questions*. The federal issues presented in Questions Presented Nos. 1 and 2 herein were raised in Petitioner's Motion To Quash No. 1 at the Trial Court level. The federal issue presented in Question Presented No. 3 was raised in Petitioner's Motion to Quash No. 2 at the Trial Court level. The federal issue presented in Question Presented No. 4 was raised in Petitioner's Motion To Quash No. 6 at the Trial Court level. The federal issue presented in Question No. 5 developed at the appellate level but the underlying points of law involved were raised in Petitioner's Motion To Quash No. 6 at the Trial Court level. As shown above, the Trial Court, after an evidentiary hearing, denied these Motions.

On appeal, Petitioner contended, *inter alia*, that the Trial Court erred in denying such Motions; that Petitioner's presence and conduct on the date and at the time and place in question were protected under the free

speech and press provisions of the 1st Amendment to the U.S. Constitution, as enjoined on the states under the Due Process Clause of the 14th Amendment to the U.S. Constitution (re Motion to Quash 1); that the school property and time involved constituted a limited public forum (*Ibid.*); that Petitioner's presence and conduct at issue were protected under the free speech and press provisions of said 1st Amendment, and *Tex. Penal Code*, § 30.05, could not be applied constitutionally to make it unlawful (re Motion To Quash 2); and that Petitioner's presence and conduct at issue were lawful under the open character nature of the property involved under *Tex. Education Code*, § 2.03, since the Advertising Policy, which operates to restrict such open character, is void as violative of the free speech and press provisions of the 1st Amendment to the U.S. Constitution and of the Due Process and Equal Protection Clauses of the 14th Amendment to the U.S. Constitution (re Motion To Quash 6).

The Court of Appeals ruled against Petitioner on these points, and overruled subsequently Petitioner's motion for rehearing which raised them again. These points, among others, were raised by Petitioner in his Petition for Discretionary Review.[5] The Court of Criminal Appeals refused such Petition.

As for the federal issue presented in Question Presented No. 5, which developed at the appellate stage of

---

[5] The point in the Court of Appeals that *Tex. Penal Code*, § 30.05, could not be applied constitutionally, etc., above, was worded in the Petition for Discretionary Review as "[w]hether *Tex. Penal Code*, § 30.05 • • • was unconstitutional as applied • • • " (Question Presented No. 8).

the case, Petitioner's Motion for Rehearing in the Court of Appeals included, as grounds for rehearing, (1) that "[t]he Court of Appeals erred when it held that *Tex. Education Code*, § 2.03, did not apply to the case *because* said § 2.03, by its very terms, makes all school property covered by the *Texas Education Code* open character property 'subject only' to the rules and regulations adopted by the governing boards of the affected institutions" (Ground for Rehearing No. 15); and (2) that the Court of Appeals erred when it refused to reach Petitioner's arguments concerning the Advertising Policy and another policy not here pertinent due to its holding that § 2.03 did not apply to the case because such refusal and holding were unlawful and unconstitutional and operated to deprive Petitioner of liberty and property without due process of law, in violation of the Due Process Clause of the 14th Amendment to the U.S. Constitution (Ground for Rehearing No. 16). (Emphasis in original.)

In his Petition for Discretionary Review, Petitioner included, as questions presented, (1) "[w]hether the Court of Appeals erred when it ruled that *Tex. Education Code*, § 2.03, did not apply to the case *where* said § 2.03, by its clear reach, does cover the property at issue and has application to the case" (Question Presented No. 5), and (2) "[w]hether the Court of Appeals deprived Petitioner of liberty and property without due process of law, in violation of the Due Process Clause of the 14th Amendment to the U.S. Constitution, when it refused to reach Petitioner's contentions that his presence and conduct at issue were proper under the open character of the property provision of *Tex. Education Code*, § 2.03, since the Advertising Policy of the Katy ISD, which was adopted

by the governing board of the Katy ISD and asserted against Petitioner for control of his presence and conduct, was unconstitutional in several particulars, *where* any holding of unconstitutionality of such policy would retain the open character of the property at issue as to the Petitioner (and would have precluded his prosecution for criminal trespass)" (Question Presented No. 6). (Emphasis in original.)

ARGUMENT

I.

PETITIONER'S PRESS AND SPEECH ACTIVITIES ON SCHOOL PROPERTY WERE AUTHORIZED CONSTITUTIONALLY OR LEGALLY

A. *The School Property.* 1. *Limited Public Forum.* The outside School property which Petitioner used for expressive purposes and the time of such use – in or near a bus unloading area before classes were to begin for the day – constituted a limited public forum for peaceful and reasonable expressive purposes. See *Dallas Association of Community Organizations for Reform Now v. Dallas County Hospital Dist.*, 670 F. 2d 629, 630-631 (C.A. 5, 1982), *reh. denied En Banc*, 680 F.2d 1391 (1982), *cert. denied*, 459 U.S. 1052 (1982) (hereinafter called *"Dallas A.C.O.R.N."*);[6] *contra: Reed v. State*, 762 S.W. 2d 640, 644 (Tex. App. – Texarkana, 1988, pet. ref.), *cert. denied*, 110 Sup. Ct. 81 (1989). Other groups or entities had been allowed by the

[6] Justice Blackmun would grant certiorari and give the case plenary consideration while Justice Rehnquist filed a dissenting opinion.

Katy ISD to have their literature or notices posted or distributed (under the Advertising Policy).

The holding by the Court of Appeals that the School grounds were a nonpublic forum (Pet. App. 4-5) is erroneous because the Court failed, *inter alia*, to consider the clear teaching of *Dallas A.C.O.R.N.* and other matters. In that case, Parkland Hospital, which is public hospital of the Dallas County Hospital District, a governmental subdivision of Texas, was considered to be a limited public forum. The instant case presents a *stronger* situation for such status because (1) the expressive activities took place *before* the property was put to its educational purpose and (2) such activities *complemented* the School's educational mission.

2. *Open Character Status.* Petitioner's presence and conduct were proper in light of the open character of the School property under Texas statutory law, a character which was not impaired by the Advertising Policy applied against him, because such Policy is violative of the 1st and 14th Amendments to the U.S. Constitution.

Under *Tex. Education Code*, § 2.03, p. 2, the School was "open to the people" of Texas "subject only" to the rules and regulations of the Board of Trustees of the Katy ISD, the governing board in this instance. This meant that it was open to Petitioner for expressive activities unless such activities were restricted, etc. by such rules and regulations. As shown below, the Advertising Policy is void as violative of the 1st and 14th Amendments to the U.S. Constitution. Accordingly, the property retained its open character for such expressive activities.

To be sure, the Court of Appeals ruled that § 2.03 did not apply to the case and, due to such ruling, did not address Petitioner's constitutional challenges to the Advertising Policy. This ruling, however, was erroneous since § 2.03 is declaratory and applies clearly to the School; and the Court's refusal to reach such constitutional challenges due to such ruling was, as shown below, pp. 20-21, unconstitutional.

B. *Legality of Petitioner's Presence and Conduct.* The Court of Appeals overruled Petitioner's points of error dealing with violations of his "free speech rights" under the 1st Amendment to the U.S. Constitution (as well as under the Texas Constitution) because of its holding that the property involved was a nonpublic forum (Pet. App. 4-5). The Court related that those points were based upon the assumption that the subject property was a limited public forum (Pet. App. 5). This overruling action was erroneous. Petitioner's presence and conduct were protected under such Amendment when measured against his right to offer literature and speak incident thereto and the right of the students to receive such information if they so desired. Petitioner's rights in such regard stem from the facts that he engaged peacefully and reasonably in expressive activities in a limited public forum. See *Dallas A.C.O.R.N., supra,* 670 F. 2d at 630-631.

From the standpoint of the students, there should be no question but that students retain their free expression rights under the 1st Amendment in a public school setting, and that they may exercise such rights so long as such conduct does not interfere substantially and materially with school discipline or interfere with the rights of others. *Tinker v. Des Moines I.C.S. Dist.,* 393 U.S. 503,

512-513, 514 (1969). Such rights should include the right to receive information, a right which emanates from the rights of speech and press under said Amendment. *Martin v. Struthers*, 319 U.S. 141, 143 (1943); *New York Times v. Sullivan*, 376 U.S. 254, 272 (1964). The exercise of such rights through receipt of information from Petitioner did not interfere substantially and materially with school discipline or with the rights of others. Their rights *to receive* information would be hollow if the Katy ISD could prohibit others from *offering* it to them. While the Katy ISD could place reasonable time, place and manner regulations on the outside distribution of literature to students from school property, it could not prohibit or prevent such distributions altogether.

Finally, Petitioner's presence and conduct were proper under the open character of the School property since, as shown below, the Advertising Policy put forth by School personnel to restrict such presence and conduct is unconstitutional under the 1st and 14th Amendments. Hence, the School property at issue was *open* to Petitioner for his peaceful and reasonable press and speech activities before classes were to begin. See *Tex. Education Code*, § 2.03.

In this regard, the Advertising Policy is void as violative of the free speech and press provisions of the 1st Amendment to the U.S. Constitution, as enjoined on the States under the Due Process Clause of the 14th Amendment thereof. As shown above, the criteria for approving literature under the Policy are essentially subjective. Reasonable minds could differ on what does or does not meet the criteria for approval. This is unconstitutional license

and censorship of the freedom of press. See *Lovell v. City of Griffin, Ga.*, 303 U.S. 444 (1938).

Moreover, the Advertising Policy is void as violative of the Equal Protection Clause of the 14th Amendment to the U.S. Constitution since it discriminates impermissibly against political or sectarian organizations and against most commercial advertising. As the Advertising Policy makes clear (pp. 7-8, above):

(1) School facilities *"shall not"* be used to advertise, etc. or "collect funds for any organization or program defined as political or sectarian in nature, without prior approval of the *Superintendent or designee,"* whereas a different situation obtains for civic or cultural groups, namely, that the *"principal may authorize"* such groups to advertise, etc. (Emphasis added.); and

(2) Commercial advertising is prohibited unless approved by the Superintendent, except for "officially approved book covers, school calendars, and/or advertising in school publications."

There is nothing in the Advertising Policy to support the discriminatory treatment expressed therein. The discrimination between the two types of organizations is broad enough to cover speech and press activities; and the discrimination concerning commercial advertising covers free expression of affected advertisers.

This type of discrimination – treating more favorably communications or expressions of some over that of others – operates to deny to members of the disfavored classifications the equal protection of the laws, in violation of said 14th Amendment. Since discrimination

against speech based on subject matter or content violates the Equal Protection Clause of said 14th Amendment [*Police Dept. of the City of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972); *Grayned v. City of Rockford*, 408 U.S. 104, 107 (1972)], discrimination against political or sectarian organizations under the Advertising Policy is, in reality, unconstitutional discrimination against their literature compared to that of civic and cultural groups. The discrimination concerning commercial advertising fails similarly.

C. *The Court of Appeals and Tex. Education Code, § 2.03.* The Court of Appeals ruled that *Tex. Education Code*, § 2.03, did not apply to the case and, due to such ruling, did not reach Petitioner's constitutional challenges to the Advertising Policy (Pet. App. 6). This ruling was erroneous since § 2.03 is declaratory and applies clearly to the affected educational institutions, including the School. It was unsupported by authority, and the Court's holding "that public school property is not 'open' for all expressive activities" (Pet. App. 6) is of no particular moment. The ruling posed no bar to review of such constitutional challenges.

The Court's failure to reach such challenges – due to such ruling – operated to deprive Petitioners of liberty and property without due process of law, in violation of the Due Process Clause of the 14th Amendment to the U.S. Constitution, because the Court denied Petitioner his full right to appellate review as established by Texas law. Petitioner was entitled to his full day in court, including his right to appellate review under Texas law. See *Le Croy v. Hanlon*, 713 S.W. 2d 335, 341 (S.C. Tex., 1986). Due

process under the 14th Amendment requires that a litigant be afforded a "fair opportunity" to secure a "meaningful appeal" on the merits of his appellate points. See *Evitts v. Lucey*, 469 U.S. 387, 393-394, 400-405 (1985).

II.

THE TEXAS CRIMINAL TRESPASS LAW WAS UNCONSTITUTIONAL AS APPLIED TO THE FACTS OF THIS CASE

The Court of Appeals erred in upholding the constitutionality of *Tex. Penal Code*, § 30.05, proscribing criminal trespass, as applied to the facts of this case. As shown above, Petitioner's presence and conduct were protected under the 1st Amendment to the U.S. Constitution, as enjoined on the States under the Due Process Clause of the 14th Amendment thereof. Accordingly, such law was unconstitutional as so applied. See *Marsh v. Alabama*, 326 U.S. 501, 509 (1946); *Tucker v. Texas*, 326 U.S. 517, 520 (1946).

CONCLUSION

For the reasons and authorities set forth, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

RICHARD W. SCHMUDE
P.O. Box 674
Tomball, Texas 77377-0674
(713) 376-0277
Attorney of Record for Petitioner

March, 1991

APPENDIX

11th Court of Appeals

Eastland, Texas

Opinion

Don Treshman

Appellant

Vs. No. 11-89-225-CR – Appeal from Harris County

State of Texas

Appellee

A jury convicted Don Treshman of criminal trespass and assessed his punishment at 180 days confinement in the Harris County Jail plus a fine of $1,000. We affirm.

On the morning of January 21, 1988, a final examination day, Treshman and two companions distributed literature regarding antiabortion, AIDS (acquired immune deficiency syndrome), and herpes to high school students at Mayde Creek High School in the Katy Independent School District (Katy ISD). School district policy required that literature from any person or organization be approved prior to its posting or distribution at the schools. Treshman testified that he never made application to distribute the literature he distributed.

The record reflects that the front of Mayde Creek High School is several hundred yards away from a public road. Treshman was on the school's sidewalk adjacent and attached to the school building by the bus loading area. He was standing five-to-ten feet from the back door of the school and two-to-three feet from the front door of the bus unloading students.

An assistant principal asked Treshman if he had permission to be on campus to distribute the literature. Treshman responded that he did not need permission and that he had a right to be there. Treshman refused to leave the campus as instructed on two occasions by the assistant principal and continued to pass out literature as the buses pulled up and discharged students.

The chief administrative officer for the school district next observed Treshman and asked Treshman if he had prior approval to pass out materials as required by school board policy. Treshman responded that he did not need approval and that he was exercising his constitutional rights. The official asked him not to pass out any more materials. When Treshman continued to assert it was his constitutional right, the official told Treshman to leave. The official also stated that Treshman disrupted the flow of students off of the buses into the building and impeded the progress of students since he was standing on the sidewalk next to the curb in front of the bus doors.

Subsequently, Dr. James Carthel, principal of the high school and the complainant in this case, asked Treshman what his business was on the campus. In response to Treshman's statement that he was there to hand out literature, Carthel replied that he was not aware of Treshman having permission to do so and requested Treshman to cease until he could look into it. Carthel was the person responsible on the campus for granting permission for people to distribute literature. When Treshman did not comply with his request to cease distributing literature, Carthel asked Treshman to step away from the students for a private talk. Treshman responded that he was a taxpayer, that he had a right to be in that location, and

that the students had a right to the information in the pamphlets. When Treshman continued to stay in the same place and hand out literature, Carthel asked Treshman to leave. Treshman recalled Carthel's phrase as being similar to, "You'll have to get out of here." To Treshman, that meant that he would have to leave the school property. Carthel testified that he never gave Treshman consent to hand out the literature while the students were present. Treshman finally left the campus 20-to-30 minutes later after all the students were in the school building.

In Points of Error Nos. 1 through 11, Treshman raises constitutional issues relating to improper restrictions on his right of free expression.

The extent to which the school authorities can control access to school property for expressive purposes depends upon whether the school property is a "public forum," a "limited public forum," or a "nonpublic forum." "Public forums" are those areas which traditionally have been devoted to assembly and public debate such as municipal streets, sidewalks, and parks. The State may enforce a content-based exclusion only where the regulation is narrowly drawn and is necessary to serve a compelling state interest. Regulations as to time, place, and manner of content neutral expressions must be narrowly tailored to serve a significant government interest and must leave open ample alternative channels of communication. Perry Education Assn. v. Perry Local Educators' Assn., 460 U.S. 37 (1983); Reed v. State, 762 S.W.2d 640 (Tex.App. – Texarkana 1988, pet'n ref'd).

"Limited public forums" consist of public property which the government has voluntarily opened for use by

the public for expressive activities. As long as it retains the open character of the facility, the government is bound in regulating expression activities by the same standards as applicable in a traditional public forum. However, only "similar entities" to those allowed access have protected rights of expression. Perry Education Assn. v. Perry Local Educators' Assn., supra; Reed v. State, supra.

"Nonpublic forums" are those which neither by tradition nor government action have become forums for public expression. Access to a nonpublic forum can be restricted as long as the regulations are reasonable in light of the purpose served by the forum, are viewpoint neutral, and are not an effort to suppress expression merely because public officials oppose the speaker's view. Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 473 U.S. 788 (1985); Reed v. State, supra.

Public school facilities and grounds have consistently been held to be nonpublic forums unless there has been an intentional opening of them to expressive activity. Perry Education Assn. v. Perry Local Educators' Assn., supra; Texas State Teachers Association v. Garland Independent School District, 777 F.2d 1046 (5th Cir. 1985), *affirmed*, 479 U.S. 801 (1986); Reed v. State, supra. Treshman urges that Katy ISD created a limited public forum by granting approval for outside organizations such as the YMCA, Little League, and other civic organizations to have their literature distributed in Katy ISD schools. We disagree. See Perry Education Assn. v. Perry Local Educators' Assn., supra; Texas State Teachers Association v. Garland Independent School District, supra. We hold that

the Mayde Creek High School grounds are a nonpublic forum.

Appellant's first three points of error, relating to violations of his free speech rights under the First Amendment to the United States Constitution and Article I, Section 8 of the Texas Constitution, are based upon the assumption that the subject property is a limited public forum. Due to our holding above, the first three points of error are overruled.

In Points of Error Nos. 4, 5, and 6, Treshman urges that TEX. PENAL CODE ANN. § 30.05 (Vernon 1989 & Supp. 1990) was unconstitutionally applied since his conduct was protected under the free speech provisions of the federal and state constitutions. The criminal trespass statute, Section 30.05, regulates conduct not speech. A general trespass statute may be constitutionally applied, even to those who trespass in order to communicate, so long as it is applied without discrimination and is not used for the primary purpose of suppressing speech. Reed v. State, supra. There is no evidence that Treshman and his two companions were asked to leave because of the viewpoint expressed in the literature they were distributing or that school officials opposed the viewpoint of the literature. Rather, the evidence reflects that Treshman and his companions were asked to leave because "they did not have approval to do anything" on the school's property. Points of Error Nos. 4, 5, and 6 are overruled.

In Points of Error Nos. 7, 8, 9, and 10, Treshman challenges the Katy ISD's Advertising Policy under the first amendment, the equal protection clause, and the due process clause of the United States Constitution and

under Article I, section 8 of the Texas Constitution. In the eleventh point of error, Treshman contends that his presence and conduct were proper under Katy ISD's Use of School Policy. Points of Error Nos. 7 through 11 are each based upon appellant's reliance on TEX. EDUC. CODE ANN. § 2.03 (Vernon 1972) as establishing an "open character" of the school property. Section 2.03 provides as follows:

> The educational institutions covered by this code are designed for and are open to the people of the State of Texas, subject only to such rules and regulations as the governing boards of such institutions may be authorized in this code to make and enforce for the welfare of the various institutions under their control.

Treshman urges that his presence and conduct were lawful under the open character of the property and that the school district's advertising policy did not eliminate the open character of the property because the advertising policy violates the federal and state constitutions. He also urges that his presence and conduct were proper under the school's use policy; thus, the property was open under the provisions of Section 2.03.

Section 2.03, in providing generally that Texas educational institutions are designed for and are open to the people of Texas, does not limit the extent to which a school can control access to its property for expressive purposes. We hold that public school property is not "open" for all expressive activities. In holding that Section 2.03 does not apply to this case, we do not reach Treshman's arguments concerning the school's advertising and use policies. Points of Error Nos. 7, 8, 9, 10, and 11 are overruled.

Treshman contends in Points of Error Nos. 12, 13, and 14 that the trial court erred in denying his motions to quash the information. In his twelfth point, he contends that the trial court erred because the information failed to allege the general locality in the county of the property as required by TEX. CODE CRIM. PRO. ANN. art. 21.09 (Vernon 1989).

In Franks v. State, 688 S.W.2d 502 (Tex.Cr.App.1985), the Court held that Article 21.09 applies to real property "alleged qua object of the offense" such as arson or offenses where the property itself is what the defendant allegedly sought to destroy but does not apply to real property "alleged only qua situs of the offense," such as in burglary offenses. Trespass is an offense against the owner's possession and control of the property rather than an offense against the property itself. The location of the property is not an element of the offense, and the allegation in the information that the offense occurred on property in Harris County, Texas, owned by complainant is sufficient. Reed v. State, supra. The twelfth point of error is overruled.

Treshman urges in his thirteenth point of error that the trial court erred because the information failed to describe the property with sufficient certainty for double jeopardy purposes as required by TEX. CODE CRIM. PRO. ANN. art. 21.04 (Vernon 1989). He contends that he was entitled to an allegation of the general locality of the property in Harris County pursuant to Article 21.09 as discussed above. We hold that, since the information's allegation that the offense occurred on property in Harris County controlled by the complainant is a sufficient description for purposes of Article 21.09, the allegation is

also sufficient for the purposes of Article 21.04. The thirteenth point of error is overruled.

In the fourteenth point of error, Treshman asserts that the trial court erred because the information failed to allege who gave notice to depart in relation to ownership of the property. Appellant's sole complaint in the motion is that the failure to allege who gave notice to depart "fails to allege an offense under Texas law." We disagree. This contention has been rejected in Erlandson v. State, 763 S.W.2d 845 (Tex.App. - Houston [14th Dist.] 1988, pet'n ref'd), *cert. denied*, ___ U.S. ___, 110 S.Ct. 152, 107 L.Ed.2d 110 (1989), and Bobo v. State, 757 S.W.2d 58 (Tex.App. – Houston [14th Dist.] 1988, pet'n ref'd). Although, we note that in the instant case, Treshman timely raised objections to the information.

The elements of the offense of criminal trespass established by Section 30.05(a) are: (1) a person (2) without effective consent (3) enters or remains on property or in a building of another (4) knowingly, intentionally, or recklessly (5) when he had notice that entry was forbidden or received notice to depart but failed to do so. Day v. State, 532 S.W.2d 302 (Tex.Cr.App. 1975). The information alleged each of the above elements. It is a rare exception when the charging instrument drawn in the language of the penal statute is legally insufficient to provide an accused with notice of the offense charged. Unless a fact is essential for such notice to the accused, the State is not required to plead evidentiary facts. Beck v. State, 682 S.W.2d 550 (Tex.Cr.App. 1985). Although Section 30.05(b) defines terms, including the term "notice," contained in Section 30.05(a), neither case law nor other statutory provisions require the State to allege who gave

the notice to depart in order to sufficiently allege the offense of criminal trespass.

Moreover, we note that the motion does not involve a claim that the information failed to give Treshman sufficient notice upon which to prepare his defense. As set forth in Adams v. State, 707 S.W.2d 900 (Tex.Cr.App. 1986), the first step in determining the adequacy of notice provided by the charging instrument is whether the information failed to convey some requisite item of "notice." If sufficient notice is given, the inquiry ends. If not, the second step is to determine whether, in the context of the case, the insufficient notice had an impact on defendant's ability to prepare a defense and, finally, how great an impact. Even assuming that an allegation of who gave notice to depart is a requisite item for a sufficient information, we find from our review of the record that the failure did not have an impact on Treshman's ability to prepare a defense. The fourteenth point of error is overruled.

Treshman urges in Points of Error Nos. 15, 16, and 17 that the trial court erred in overruling various objections to certain jury instructions in the charge.

In his fifteenth point of error, Treshman argues that the trial court erred in overruling his objection to the charge because the abstract definition of the offense of criminal trespass failed to include a culpable mental state. The abstract definition did not include a culpable mental state. However, immediately following the abstract definition, the charge specifically defined terms used, including "intentionally" and "knowingly." The paragraph

applying the law to the facts properly alleged the culpable mental state of "intentionally and knowingly."

Treshman relies upon Doyle v. State, 631 S.W.2d 732 (Tex.Cr.App.1980), for the proposition that the omission of culpable mental state in the abstract statement is reversible error. As Treshman acknowledges, *Doyle* involved the opposite situation than in the instant case. The charge in *Doyle* included culpable mental state in the abstract portion but omitted it in the application portion. The Court in *Doyle* compared the significance of the abstract and the application paragraphs as follows:

> The definitional or abstract portion of the charge is nothing more than a dictionary for the jury to use in defining legal words and terms. But, like words found in a dictionary, the true and correct meaning of legal words and terms is not shown until they are properly used in a sentence, i.e., until they are applied. (Citation omitted)
>
> If, however, we were to allow a jury to look to the abstract, or the definitional portion of the charge, to seek out and possibly find completely omitted elements of the offense, as opposed to explanations by the trial court of the law, and the law as applied to the facts, jurors would be able to convict a citizen of this State on alternative elements which were not stated in the charging instrument, thus depriving a defendant of a fair and impartial trial by jury which our Constitutional law mandates he shall receive.

The fact that an offense is abstractly defined in the language of the statute without including a mental state does not amount to reversible error where the culpable mental state was charged in the application of the law to

the facts. Wright v. State, 679 S.W.2d 23 (Tex.App. – Tyler 1984, pet'n ref'd).

Moreover, we find that the charge, when read as a whole, correctly apprised the jurors as to the offense of criminal trespass. See Whaley v. State, 717 S.W.2d 26 (Tex.Cr.App.1986); Phillips v. State, 753 S.W.2d 813 (Tex.App. – Austin 1988, pet'n ref'd). The fifteenth point of error is overruled.

Appellant argues in the sixteenth and seventeenth points of error that the trial court erred in overruling his objections to the use of the disjunctive "enter or remain" in the abstract statement of the offense of criminal trespass and in the paragraph applying the law to the facts. He contends that Section 30.05 describes two offenses: (1) entering on the property of another and (2) entering *and* remaining on the property of another. Appellant contends that he was charged with the second type of trespass and that the court's instruction must necessarily use the phrase "enters *and* remains" in describing the offense in the abstract and application paragraphs. We disagree.

Section 30.05(a) provides:

> A person commits an offense if he enters *or* remains on property or in a building of another without effective consent and he:
>
> (1) had notice that the entry was forbidden; or
>
> (2) received notice to depart but failed to do so. (Emphasis added)

The charge tracked the language of the statute, which establishes criminal trespass as an offense for either entering *or* remaining. Although the information alleges

in the conjunctive that appellant entered and remained and the charge instructs in the disjunctive, this is not error. Vaughn v. State, 634 S.W.2d 310 (Tex.Cr.App. 1982). The sixteenth and seventeenth points of error are overruled.

Points of Error Nos. 18, 19, and 20 are based upon the State's closing jury argument at the guilt/innocence phase of trial. The eighteenth point of error relates to the following argument:

> DISTRICT ATTORNEY: And ladies and gentlemen, those channels exist. The defendant didn't even bother to see if this information could go through those channels. The last time they submitted it was in 1986. They didn't submit for approval in '87, they didn't submit for approval in 1988. They're out there handing it out. *Is that what parents want?* (Emphasis added)
>
> DEFENSE COUNSEL: Objection to that, Your Honor.
>
> THE COURT: Sustained.
>
> DEFENSE COUNSEL: Your Honor, we request a mistrial at this point.
>
> THE COURT: Overruled.

Treshman contends that the statement emphasized above is not within the four permissible areas of jury argument set forth in Alejandro v. State, 493 S.W.2d 230 (Tex.Cr.App.1973). He argues that such comment was outside the record and injected a new subject irrelevant to the issues at trial and was inherently prejudicial.

Error is not preserved for review in the absence of a proper objection, a request for instruction to disregard, and a motion for mistrial. Brooks v. State, 642 S.W.2d 791

(Tex.Cr.App.1982). An instruction to disregard will usually cure any error. Brooks v. State, supra. We hold that error was not preserved due to the general objection which did not specify the nature or ground of complaint appellant was relying upon and the failure to request an instruction to disregard. Moreover, the statement was not so prejudicial that it could not be cured by an instruction to disregard, and it did not inject new facts harmful to appellant into the proceedings. See Denison v. State, 651 S.W.2d 754 (Tex.Cr.App. 1983, en banc). The eighteenth point of error is overruled.

The nineteenth point of error relates to the following:

> DISTRICT ATTORNEY: The law says criminal trespass occurs when the elements are met. The elements have been met by the defendant's own testimony. And if you're still not real concerned about his testimony, think about his own defense witness, Mr. Smith. He corroborated every element.
>
> DEFENSE COUNSEL: Objection, Your Honor. He did no such thing.
>
> THE COURT: Overruled.
>
> DEFENSE COUNSEL: There's been no admission to those elements, all the elements.
>
> THE COURT: Overruled.

Treshman contends that the trial court's rulings were improper because the rulings sent a message to the jury and had the effect of commenting on the evidence prohibited by TEX. CODE CRIM. PRO. ANN. art. 38.05 (Vernon 1979).

Treshman did not object that the trial court's action constituted a comment on the weight of the evidence and

has, thus, failed to preserve error. Nelson v. State, 661 S.W.2d 122 (Tex.Cr.App.1983); Madrigal Rodriguez v. State, 749 S.W.2d 576 (Tex.App. – Corpus Christi 1988, pet'n ref'd); Wilson v. State, 730 S.W.2d 438 (Tex.App. – Fort Worth 1987, pet'n ref'd). Moreover, the trial court's action in overruling an objection without additional comment is not a comment on the weight of the evidence. Smith v. State, 595 S.W.2d 120 (Tex.Cr.App.1980), *habeas corpus granted on other grounds*, Ex parte Smith, 650 S.W.2d 68 (Tex.Cr.App.1981). The nineteenth point of error is overruled.

In the twentieth point of error, Treshman contends that the following action of the trial court was erroneous because it sent a message to the jury or allowed the jury to consider elements of the offense committed not by Treshman but by one of his witnesses:

> DISTRICT ATTORNEY: Mr. Smith took the stand and took him through each and every element. He admitted that they were out there without permission, he admitted being told to leave, he admitted –
>
> DEFENSE COUNSEL: Objection, Your Honor. Mr. Smith's elements as to him are totally inapplicable.
>
> THE COURT: The evidence is before the jury. Overruled.

Treshman relies upon cases involving co-defendants tried jointly where the charge authorized the jury to convict one defendant upon a finding that the other co-defendant was guilty, without a finding that the first

defendant was guilty as a party to the offense. In contrast, in the instant case, Smith was involved with Treshman in the episode upon which this suit was based and was called by the defense as a fact witness to testify to the events and circumstances surrounding Treshman's activities on the school property. Smith was not charged as a defendant in this cause and was, thus, not testifying as a party to this case. The twentieth point of error is overruled.

In Points of Error Nos. 21, 29, and 30, Treshman argues that the trial court erred in overruling various motions for mistrial. The twenty-first point relates to the following State's cross-examination of Treshman:

> DISTRICT ATTORNEY: So, Mr. Treshman, you would agree with me, wouldn't you, that your trespass was completed well before the flip remark was made by Dr. Carthel for you to stay and help clean up the litter mess? Would you agree?
>
> DEFENSE COUNSEL: Judge, I object to that as inflammatory. There's been no trespass established, and I move for a mistrial.
>
> THE COURT: The objection is sustained. Motion for a mistrial is overruled.
>
> DEFENSE COUNSEL: Your Honor, could we have an instruction or an admonition *to State's attorney* from refraining from that type of characterization? (Emphasis added)
>
> THE COURT: The charge of trespass will not be established until such time as it's proven beyond a reasonable doubt.

Treshman contends that the question is improper and prejudicial and that the sustaining of the objection and

the instruction concerning the establishment of trespass were insufficient to remove the prejudice. We disagree. Treshman failed to request an instruction to the jury to disregard. He merely requested an instruction or admonition to the State's attorney. Therefore, he failed to preserve error. Moreover, the mere asking of an improper question will not constitute reversible error unless the question results in obvious harm to the accused. Such error is cured by an instruction to disregard unless it appears that the question alone is clearly calculated to inflame the minds of the jury and is of such a character as to suggest the impossibility of withdrawing the impression produced on their minds. Brown v. State, 692 S.W.2d 497 (Tex.Cr.App.1985). We find that the question could have been cured by an instruction to disregard had one been requested and given. The twenty-first point of error is overruled.

The twenty-ninth point of error relates to the State's direct examination of its witness, Gary Williams:

> DISTRICT ATTORNEY: Mr. Williams, what is the function of the school?
>
> WITNESS: We're an educational institution. We're there for the kids.
>
> DISTRICT ATTORNEY: And what is the purpose of the policy under which the information is disseminated?
>
> WITNESS: Well, of course, there are certain controls that need to be put in place. There's a certain order that we want to do because we are an educational institution. Just to allow indiscriminate handing out of literature would defeat the purpose of an educational institution.

DEFENSE COUNSEL: Your Honor, I object to that as unresponsive and ask that it be stricken and the jury instructed to disregard it.

THE COURT: Sustained. Disregard.

DEFENSE COUNSEL: And, Your Honor, defense moves for mistrial.

THE COURT: Overruled.

The thirtieth point of error relates to the following redirect examination of Williams:

DISTRICT ATTORNEY: In this federal lawsuit, Mr. Williams, has there been a ruling by the Court upholding your policy?

WITNESS: Yes.

DEFENSE COUNSEL: Objection, Your Honor.

THE COURT: Sustained.

DEFENSE COUNSEL: Your Honor, I ask that that quick response be stricken, the jury be instructed to disregard.

THE COURT: I've sustained the objection because it's not relevant in this trespass case. None of the material about the federal lawsuit, except for very limited purposes is relevant. Let's get on with this lawsuit, please.

DEFENSE COUNSEL: Judge, would you instruct the jury to disregard that last –

THE COURT: Please disregard.

DEFENSE COUNSEL: And, Your Honor, we move for a mistrial.

THE COURT: You will disregard that. Overruled.

Treshman urges in the twenty-ninth and thirtieth points that the trial court erred in overruling his motions

for mistrial because the instructions to disregard were insufficient to remove the prejudice to Treshman. We disagree.

An instruction to disregard improper evidence is generally sufficient to cure error in its admission. Woods v. State, 653 S.W.2d 1 (Tex.Cr.App.1982). We find that the testimony is not so prejudicial as to have introduced incurable error into the trial. The twenty-ninth and thirtieth points are overruled.

Treshman argues in the twenty-second point of error that the trial court erred in not permitting redirect examination of Treshman covering the same testimony previously given when the State made no objection to redirect examination of Treshman. Treshman made no objection to the trial court's action and has, thus, failed to preserve error. Brooks v. State, supra. Moreover, we find that the trial court properly exercised its duty under TEX. R.CRIM.EVID. 610(a) to control the mode and order of interrogating witnesses and of presenting evidence so as to avoid needless consumption of time. The twenty-second point of error is overruled.

In the twenty-third point of error, Treshman contends that the trial court erred in overruling his motion for directed verdict when the State closed and in overruling his motion for acquittal because the evidence was insufficient to establish that Treshman's presence on the property was without complainant's consent.

In reviewing the sufficiency of the evidence, an appellate court must view the evidence in the light most favorable to the jury's verdict to determine whether any

rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307 (1979); Butler v. State, 769 S.W.2d 234 (Tex.Cr.App.1989).

While acknowledging that complainant did tell Treshman to stop distributing literature and to leave, Treshman argues that the complainant gave or implied permission to Treshman to remain on the property at four different times. Treshman urges that such permission was inconsistent with the evidence that Treshman was on the property without the effective consent of the complainant.

The first incident he relies upon is the complainant's request that he step aside for a private conversation. The record reflects that the complainant requested Treshman to cease distributing literature which Treshman had not obtained prior approval to distribute as required by school policy. When Treshman ignored the complainant, the complainant requested Treshman to step aside for a private conversation. When Treshman failed to come out of the crowd and continued to hand out literature, complainant informed him that he would have to leave if he was not going to cooperate.

The second incident Treshman relies upon is complainant's invitation to him to clean up the cafeteria. The evidence reflects that, as Treshman's group was preparing to leave, the complainant asked if the group would like to come into the cafeteria to clean up the litter of literature dropped by students. The complainant stated that the "offhand remark . . . that wasn't appropriate" was "corrected within five seconds."

The third incident relates to permission given to look for van keys. The evidence shows that when one of the group members wished to look for his van keys so the group could leave, complainant consented to the van driver's request to look for the keys in the area where the group distributed literature with the response, "[Y]ou may go ahead and look, but you better hurry up."

Finally, Treshman relies upon tacit permission given to remain on the property to talk to a security officer. The record reflects that, after all students were inside the building and Treshman's group was leaving, a school district security officer arrived in response to the call of the school officials. The complainant indicated that the group should stay and talk to the security officer. The complainant testified that the purpose of his remark for Treshman's group to remain was for investigating the matter.

The record also reflects that the complainant did not give Treshman consent to be present on the property. In viewing the evidence in the light most favorable to the verdict, we conclude that the evidence is sufficient for a rational fact finder to find beyond a reasonable doubt that Treshman's presence on the property was without complainant's consent.

The trial court did not err in overruling Treshman's motions on the ground of insufficient evidence because there was "evidence which the jury could have believed in arriving at such a verdict." Kuykendall v. State, 609 S.W.2d 791 (Tex.Cr.App.1980). The twenty-third point of error is overruled.

In Points of Error Nos. 24, 25, 26, 27, and 28, Treshman argues that the trial court erred in overruling his oral motion in arrest of judgment. The bases of these points have been urged in other points which have been rejected. These points are overruled.

The judgment of the trial court is affirmed.

PER CURIAM

July 12, 1990

Do not publish. See TEX.R.APP.P. 90.

COURT OF APPEALS
Eleventh District of Texas

100 WEST MAIN STREET
P.O. BOX 271
EASTLAND, TEXAS 76448

AUSTIN McCLOUD
CHIEF JUSTICE

BOB DICKENSON
JUSTICE

WILLIAM G. (BUD) ARNOT, III
JUSTICE

OLETA MOSELEY
CLERK

AREA CODE 817
629-2638

August 30, 1990

Richard W. Schmude
Attorney at Law
P.O. Box 674
Tomball, TX 77375

John B. Holmes
District Attorney
201 Fannin
Houston, TX 77002

RE: CASE NO. 11-89-00225-CR TRIAL COURT CASE NO. 8802612

STYLE: Treshman, Don
V: The State of Texas

The Court has this day OVERRULED Appellant's motion for rehearing in the above cause.

Please sign and return immediately the enclosed postcard to signify receipt of this letter.

If either party wishes to file a Petition for Discretionary Review, please note that pursuant to TEX.R.APP.P. 202(d)(7), revised July 1, 1989, a copy of our Court's

opinion(s) must be attached to each copy of the Petition for Discretionary Review.

Respectfully yours,
Oleta Moseley, Clerk
By /s/ Johanna Blair
Deputy

(SEAL) (INK STAMP) OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS (POSTMARK and POSTAGE)

RE: Case No. 1040-90
STYLE: TRESHMAN, DON

December 5, 1990
COA#: 11-89-00225-CR

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

MAIL TO: Richard W. Schmude
P. O. Box 674
Tomball, TX 77375

(SEAL) (INK STAMP) OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS (POSTMARK and POSTAGE)

RE: Case No. 1040-90
STYLE: TRESHMAN, DON

December 19, 1990
COA#: 11-89-00225-CR

ON THIS DAY THE APPELLANT'S MOTION FOR REHEARING WAS FILED WITH THIS COURT.

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

MAIL TO: Richard W. Schmude
P. O. Box 674
Tomball, TX 77375

Court of Criminal Appeals

(SEAL)

State of Texas
Box 12308
Capitol Station
Austin 78711

THOMAS LOWE
Clerk

RICHARD WETZEL
Executive Administrator

Richard Schmude
P.O. Box 674
Tomball, Texas 77375

February 7, 1991

Re: Don Treshman
CCA No. 1040-90
COA No. 11-89-00225-CR

Dear Mr. Schmude:

Your motion for rehearing was inadvertently marked "filed" in this Court on 12/19/90. Your motion should have been "rejected" for noncompliance with rule 230(b) T.R.A.P.

Very truly yours,

/s/ John F. Brown
John F. Brown
Deputy Clerk

cc: - clerk, 11th Court of Appeals
John Holmes